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No. 92-546

In The

Supreme Court of the United States

October Term 1992

THE WASHINGTON WATER POWER COMPANY,

Petitioner,

v.

SPOKANE INDIAN TRIBE,

Respondent.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Were the property rights of the Respondent in the case below *Spokane Indian Tribe v. State of Washington, Washington Water Power Company, and United States of America* (United States District Court, Eastern District of Washington No. C-82-7753-AAM; United States Court of Appeals, Ninth Circuit, Docket No. 91-35000) distinctly put in issue and directly determined by the Federal Energy Regulatory Commission or by the District of Columbia Circuit Court of Appeals in *Washington Water Power Company v. Federal Energy Regulatory Commission*, 775 F.2d 305, (D.C. Cir., 1985), which reviewed the Commission's decision?

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INTRODUCTION

The Respondent, Spokane Indian Tribe, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the United States Court of Appeals for the Ninth Circuit in this case. That opinion is an unpublished Memorandum Opinion dated March 12, 1992, as set forth in the Petitioner's Appendix, page 4a.

STATEMENT OF CASE

I. STATEMENT OF FACTS[1]

In 1881 President Rutherford B. Hayes set aside the Spokane Indian Reservation by executive order:

> It is hereby ordered that the following tract of land, situated in Washington Territory be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely: . . . thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River . . .

1 Kappler, *Indian Affairs, Laws and Treaties*, 925.

Around 1905, David Wilson, a private entrepreneur, owned certain lands on the south bank of the Spokane River near Little Falls, approximately 45 miles downstream from Spokane, Washington. In order to use the 83 foot drop in the river, to develop a hydroelectric power site, he needed to obtain an easement or interest in the north bank as well as the riverbed and appurtenant waters thereto.

The north bank of the Spokane River and all lands up to the high water mark on the south bank, including the riverbed itself, lay within the boundaries of the Spokane Indian Reservation. *Id.*

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[1] Respondents facts are set forth in affidavits submitted to the trial court for purposes of motions for summary judgment. The affidavits are part of the record submitted to the Circuit Court of Appeals.

Unwilling to make an investment under the strictures of obtaining a right-of-way pursuant to the Act of February 15, 1901, 31 Stat. 790 ("The 1901 Act"), Mr. Wilson enlisted Representative Wesley L. Jones of Washington, Congressman for that District, to sponsor a bill "[p]roviding for the acquirement of water rights . . . [and] land- . . . for sites for power purposes and the beneficial use of said water, and for other purposes. This bill, later enacted as the Act of March 3, 1905, 33 Stat. 1006, Pet. App. at iiia, ("the 1905 Act"), applied only to the Spokane River along the southern boundary of the Spokane Indian Reservation. It empowered the Secretary of Interior to consent to citizens, associations, and corporations of the United States to "use the waters" within the southern boundary of the Reservation pursuant to the laws of the State of Washington". *Id.*

The 1905 Act also empowered the Secretary of Interior to "grant" such appropriators the use of land, on the north bank, within the Reservation "for the erection of suitable water, electric, or power plants, dams . . . and other needful structures required for the development of power or for the beneficial use of said water." *Id.*

Immediately after Congress passed the 1905 Act Mr. Wilson took steps to secure interest in a tract of land on the north bank of the Spokane River and for the use of water rights pursuant to the provisions of the legislation. His application for a permit concerning the same was granted on November 3, 1906. Less than a year later he sold his interest to Washington Water Power.

In 1908 Washington Water Power began construction of the hydroelectric development on the Spokane Indian

Reservation. The plant facility was built on the north side of the Spokane River. As a result, Washington Water Power made use of about ten acres of additionally acquired Reservation lands not included in the purported acquisition assigned to it by its predecessor, David Wilson.

On May 18, 1908, Washington Water Power applied to the Secretary of the Interior for the right to use the waters of the Spokane River at the point of appropriation within the Reservation, as well as lands situated at the same location. The application was approved on May 6, 1910.

Little Falls hydroelectric development began producing electric energy that same year. This use of Reservation lands and waters, and the resulting interference with Tribal rights and interest in the property and its fisheries gave rise to the present controversy.

II. STATEMENT OF PROCEEDINGS

On October 13, 1982, the Spokane Tribe of Indians filed the present lawsuit in the United States District Court, Eastern District of Washington, against the defendants State of Washington and Washington Water Power Company for purposes of obtaining declaratory relief concerning ownership of the title to the bed and northern bank of the Spokane River, and water rights of that river, all of which lay within the southern boundary of the Spokane Indian Reservation. Complaint of Spokane Indian Tribe, No. C-82-753-AAM, E.D. Wash, filed October 13, 1982, Pet. App. at 68a. The Tribe's request for declaratory relief vis-a-vis Washington Water Power is principally an effort to obtain a final judgment declaring

the respective interests of the parties in and to the subject lands. *Id.*

In addition to seeking declaratory relief, the Spokane Tribe prayed for monetary damages against Washington Water Power for (1) that company's wrongful and lawful building, maintenance and operation of Little Falls Dam and reservoir on the Spokane Indian Reservation, and (2) for the loss of Tribal fisheries caused by the defendant's hydroelectric project. *Id.*

On December 21, 1984, during the pendency of its appeal of administrative decisions,[2] the first in a series of many summary judgment motions were filed by either party. Finally on November 9, 1989, all of the parties' motions for summary judgment were heard before the District Court. The District Court granted Washington Water Power's collateral estoppel motion. All of the Tribes' motions for summary judgment were denied. *See*, Order RE WWP and Litigation Schedule, Pet. App. at 16a. The Tribe moved for reconsideration but the District Court denied those motions. *See*, Order Denying Motion for Reconsideration, Pet. App. at 26a.

On September 14, 1990, the trial court entered an order certifying finality of its orders previously entered on summary judgment.[3] The appeal to the Ninth Circuit

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[2] Petitioner has set forth lengthy and argumentative discussion of the administrative proceedings which culminated in the decision of *Washington Water Power v. Federal Energy Regulatory Commission*. Respondent will properly address the issue of the *WWP v. FERC* proceedings below.

[3] Disclaimers of interest were subsequently filed on behalf of the United States and the State of Washington in the original

followed. The Ninth Circuit entered its Memorandum Decision on March 12, 1992 (Pet. App. at 4a), which is the subject of the Petition to this court.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION BELOW CONSISTENTLY APPLIED DECISIONS OF THIS AND OTHER COURTS ON THE ISSUE OF COLLATERAL ESTOPPEL[4]

A. COLLATERAL ESTOPPEL APPLIES ONLY WHERE THERE IS AN IDENTITY OF ISSUES, THE ISSUE TO BE PRECLUDED ACTUALLY WAS LITIGATED AND DECIDED IN THE PRIOR ACTION AND DECIDING THE ISSUE WAS NECESSARY TO THE COURT'S JUDGMENT.

Collateral estoppel precludes parties from relitigating issues already

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bed and banks of the Spokane River in the Spokane Indian Reservation. See Pet. at iii. Based on these disclaimers and the stipulation of the parties' judgment was entered quieting the Tribe's title in and to the river and riverbed as to the State of Washington and the United States. Therefore, all defendants were dismissed from the lawsuit pending appeal.

[4] The issues before the Ninth Circuit on appeal included collateral estoppel, and the separate issues of extinguishment and diminishment of the boundaries of an Indian Reservation. The Ninth Circuit chose to rule only on the collateral estoppel and remand to address the remaining issues. If WWP ultimately prevails on the issue of collateral estoppel the effect would be the extinguishment and diminishment of the boundaries of an Indian Reservation without the express consent of Congress contrary to the established law of this court. *See, e.g. County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 105 S.Ct. 1245.

> *Distinctly* put in issue, and *directly* determined by a Court of competent jurisdiction.

Southern Pacific Railroad Co. v. United States, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27 (emphasis added), accord *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970. *See, Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906.

The Ninth Circuit correctly held in its March 12, 1992, Memorandum Opinion:

> Collateral estoppel applies when (1) there is an identity of issues, (2) the issue to be precluded actually was litigated and decided in the prior action, and (3) deciding the issue was necessary to the Court's judgment. *Little v. United States*, 794 F.2d 484, 487 (9th Cir., 1986).

Memorandum Order at 3, Pet. App. at 8a-9a. *Little* specifically sets forth the above collateral estoppel test in context of the *Montana* decision. 794 F.2d at 487.

In its Petition, Washington Water Power claims that all issues of title to Reservation lands and waters have been litigated and necessarily decided in *Washington Water Power Company v. Federal Energy Regulatory Commission*, 775 F.2d 305 (D.C. Cir. 1985) ("*WWP v. FERC*").

WWP v. FERC evolved out of administrative proceedings before the Federal Energy Regulatory Commission.[5]

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[5] The proceedings that the *WWP v. FERC* court reviewed are set forth at: *Washington Water Power Company, Project 2545*, 11 FERC ¶ 63,001, pp. 65,001 et seq. (1980) (Pet. App. at 345a); *The Washington Water Power Company, Project 2545-007*, FERC Opinion No. 117, 15 FERC ¶ 61,039, pp. 61,064 et seq. (1981) (Pet. App at 417a); *The Washington Water Power Company, Project*

In those proceedings the Commission claimed that Washington Water Power's Little Falls project was subject to licensing under the Federal Power Act. 16 U.S.C. § 791, et seq. The Tribe intervened in those proceedings. The Commission stated:

> Decision on the issue of Commission licensing jurisdiction will thus be focused on determination of the threshold issue of whether WWPC possessed a valid permit or right-of-way prior to June 10, 1920. The decision will not address questions of land titles, water rights, compensation, or Spokane Tribal rights, since these are clearly extraneous to the determination of the threshold jurisdictional issue.

11 FERC ¶ 63,001, Pet. App. at 351a-352a. The two subsequent administrative decisions rendered in this matter affirmed FERC's original determination and denied rehearing. See note 5, *supra*.

WWP then appealed these administrative decisions to the Circuit Court of Appeals for the District of Columbia. The D.C. Circuit in *Washington Water Power v. Federal Energy Regulatory Commission* framed the issues in that case as follows:

2545-007, FERC Opinion No, 117-A, 25 FERC ¶ 61,002, pp. 61,064 et seq. (1983) (Pet. App. at 480a).

Petitioner claims that the Spokane Indian Tribe "provoked" 21 years of vexatious litigation against WWP. It is quite evident in the above paragraph that the *FERC* proceedings were conducted by the Commission on their own accord regardless of the Spokane Tribes' intervenor status. To this day *no* tribunal has issued a decision on the claims of the Tribe as prayed for in their complaint in this case.

(1) "Whether Washington Water Power, prior to June 10, 1920, possessed a 'valid existing right-of-way to operate, or maintain (a) dam' at the Little Falls on the Spokane River." 775 F.2d at 311.

(2) "Whether these rights fall within the exception recognized and granted in §§ 23(A) and 23(B) of the Federal Power Act. 16 U.S.C. §§ 816 and 817." 775 F.2d at 323.

The *WWP v. FERC* Court had jurisdiction to hear appeals from decisions entered by the Federal Energy Regulatory Commission (See 16 U.S.C. § 825*l*) and made its ruling based on the record established in those administrative proceedings below. The issues focused upon WWP's claim that it was exempt from licensing. They clearly were not identical to issues raised by the Spokane Tribe in this case concerning its continuing proprietary interest in lands and waters acquisitioned for use by WWP, nor did they encompass issues of compensation for losses suffered by the Tribe as a result of the dam and reservoir.

In its Memorandum Decision below, the Ninth Circuit was correct when it stated:

> Neither issue implicates the Tribe's claimed ownership interest in land. Since the ownership issue could be resolved in the Tribe's favor without creating an inconsistency with Washington power [*WWP v. FERC*], the Tribe is not collaterally estopped from asserting its ownership claim. WWPC could have a valid right-of-way over land that is owned by the Tribe.

Memorandum Decision at 5, Pet. App. at 11a.

The Ninth Circuit below was also correct in stating that "the Tribe's ownership interest was never actually litigated during the Washington power proceedings." Memorandum Decision at 5, Pet. App. at 11a. The *WWP v. FERC* Court was evaluating the decision of the Federal Energy Regulatory Commission below it. The Commission decided that the Spokane Tribe's title, water rights and compensation therefor were "clearly extraneous" to the evaluation of WWP's licensing requirements. 11 FERC ¶ 63,001, Pet. App. at 352a. Having been foreclosed from litigating those specific issues in that forum, the Spokane Tribe was left with no alternative but to continue in United States District Court with the instant lawsuit.

The respective right, title and interests of the litigants in *WWP v. FERC* were no more a concern on judicial review than they had been during the underlying administrative process. The only significant question before the Court was whether the 1905 Act in and of itself authorized the building of the dam or reservoir, or whether some separate authority was required to accomplish this particular undertaking. 775 F.2d at 310-26; *see also* 775 F.2d at 338 (Mikva, J. dissenting).

Admittedly, the Appellate Court at one point referred to WWP's interest as being a "limited fee with implied reverter for non-use." 775 F.2d at 325 (citing, *United States v. Big Bend Transit Company*, 42 F.Supp. 459 (E.D. Wash. 1941)); however, on numerous other occasions this same interest was characterized as a "right-of-way" interest or easement, in contrast to the revocable permit which could be obtained under the 1901 Act. *See generally* 775 F.2d at 308-26. *Cf. Abraham v. Casey*, 179 U.S. 210, 220, 21 S.Ct. 88, 92. (References and opinions of courts will not be held res

judicata as to a question of title to property where that preclusive language of the opinion will not allow the issue to be adjudicated properly.)

The *WWP v. FERC* Court threshold determination focused on the issue of whether WWP had an existing right-of-way to operate or maintain a dam at the Little Falls site on the Spokane River. 775 F.2d at 311. The Court then had to determine whether that right fell within the exceptions to the Federal Power Act for licensing. 775 F.2d at 323. At no time was the Tribe's interest in the disputed property at issue before the *WWP v. FERC* Court.

Once the threshold question was answered, all other pronouncements incidental or collateral to determination of the case at hand would constitute dicta and, therefore, not preclude litigation of issues now raised in this lawsuit. *N.L.R.B. v. Master Slack and/or Master Trouser Corporation*, 773 F.2d 77, 81 (9th Cir. 1985). *See, Parklane Hosiery Corp v. Shore*, 439 U.S. 322, 99 S.Ct. 970 (1979). *See also, Mother's Restaurant, Inc., v. Mama's Pizza, Inc.*, 723 F.2d 1566 (Fed. Cir., 1983) (Incidental or collateral determination of a non-essential issue will not preclude future litigation of the same); Restatement 2d of Judgments, § 27, comment h, 1982.

Likewise, the decision in *United States v. Big Bend Transit Company, supra*, cited by the *WWP v. FERC* Court, 775 F.2d at 325, for the proposition the 1905 Act confirms a limited fee interest with implied right of reverter, is not controlling. That case was decided in the context of a condemnation proceeding. The sole, dispositive issue was whether the condemnee, through its efforts towards

acquisition under the 1905 Act, was entitled to seek compensation for the government's condemnation of lands along the Spokane River associated with the Grand Coulee Dam Reservoir. The *Big Bend Transit* Court answered in the affirmative and held the condemnee was entitled, based on estoppel theories, to have the issue of compensation submitted to a jury. 42 F.Supp. at 473-75. The type of interest acquired by the condemnee was not an issue before the Court.

B. PETITIONER INCORRECTLY IMPLIES A DIVERGENCE OF CIRCUIT AUTHORITY WHERE COLLATERAL ESTOPPEL IS THE REAL ISSUE.

Petitioner improperly invokes the language of this Court rules[6] to attempt to argue that the decision of the Ninth Circuit is or will lead to a conflict of decisions between circuits.[7] This is simply not the case. Petitioner's attempt to fit the square peg of collateral estoppel into the round hole of this Court's jurisdictional requirements is unfounded as a last effort to reverse the Ninth Circuit's sound decision.

On numerous occasions this Court has granted certiorari due to a divergence in circuit opinion, where a

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[6] Rules of the Supreme Court of the United States, Rule 10.1 (a). Pet. at 43.

[7] Petitioner even goes on to make the ludicrous statement that in the event that this Court does not grant certiorari the United States District Court for the Eastern District of Washington would be put in the position of questioning the authority of the D.C. Circuit Court of Appeals. Pet. at 48.

difference in circuit opinion on the interpretation of a statute, or other rule of law has been apparent. *See Buffalo Forge Co. v. United Steel Workers of America*, 428 U.S. 397, 96 S.Ct. 3141, *United States v. ITT Continental Banking Company*, 420 U.S. 223, 95 S.Ct. 926, and *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990. Collateral estoppel cannot be a substitute. The rule naturally invokes judgment of separate tribunals and should not be interpreted as divergence.

The policies announced by this Court on the rules of res judicata and collateral estoppel are strong and in no way threatened in this case. They establish that issues distinctly and directly determined by a court should not be disputed in a later action. The doctrines will "secure the peace and repose of society by settlement of matters capable of judicial determination" . . . to aid judicial tribunals towards conclusiveness of decisions. *Southern Pacific Railroad*, 168 U.S. 1, 48, 18 S.Ct. 18, 27. In addition, this Court has underlined the importance in the finality of a decision in a real property dispute so future title is ensured. *Nevada v. United States*, 463 U.S. 110, 130 n. 10, 110 S.Ct. 2906, 2918. The Spokane Indian Tribe asks for a court to lend such finality. Complaint of Spokane Indian Tribe, No. C-82-753-AAM, E.D. Wash, filed October 13, 1982, Pet. App. at 68a. At no time has any tribunal ruled on the merits of the respondent Tribe's Complaint in this case. The *WWP v. FERC* Court only reviewed the Federal Energy Regulatory Commission decision which held that the issue of the Tribe's rights were "clearly extraneous" to the determination of licensing jurisdiction. 11 FERC ¶ 63,001, Pet. App. at 351a-352a.

II. THERE ARE NO SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT OF CERTIORARI

Certiorari will be granted by this Court where important questions and issues are raised. *See, e.g. United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021 (certiorari granted because of the obvious importance of the question), *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (certiorari granted on an important Constitutional question).

As petitioner has stated the record in this case is long and involved.[8] Under most circumstances this Court will not interfere with a circuit court of appeals decision where a "conscientious consideration" of the record and an appreciation of circumstances of the record has yielded the result below. *N.L.R.B. v. Pittsburgh*, 340 U.S. 489, 503, 71 S.Ct. 453, 456. The Ninth Circuit has sifted through the surplusage in the record below and made its decision based on the fact that the Spokane Indian Tribe has not had its property rights properly addressed or vindicated. This is quite clear in the interpretation of the language of the Federal Energy Regulatory Commission proceedings and the *WWP v. FERC* case decision on the narrow issues before it.

WWP is misleading this Court by suggesting that the *WWP v. FERC* decision gave them a fee simple absolute in the Little Falls property. On the contrary, that decision only recognized that WWP had acquired sufficient rights

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[8] See e.g. petitioner's Appendix pages 1a-754a. The parties have submitted that they have not included the entire record due to its bulk. *Supra* and Pet. at 21.

under the 1905 Act to trigger the exceptions in the licensing provisions of the Federal Power Act. 775 F.2d 305.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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